NO. 85382-7

SUPREME COURT OF THE STATE OF WASHINGTON

DOUGLAS FELLOWS,
as Personal Representative of the Estate of JORDAN GALLINAT,

Petitioner,

v.

DANIEL MOYNIHAN, M.D., KATHLEEN HUTCHISON, M.D.,
and SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

JOINT BRIEF OF RESPONDENTS

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I. SUMMARY OF ARGUMENT

In his opening appellate brief, plaintiff makes five main arguments in support of his assertion that the trial court erred in denying his request for production of the hospital's credentialing records for Drs. Moynihan, Hutchinson, and/or Ahearn based on the privileges afforded to hospital quality improvement/peer review committee records in RCW 70.41.200(3) and RCW 4.24.250(1). None of those arguments, however, is borne out by the judicial decisions or statutory exceptions upon which he relies.

Plaintiff's first argument – that the records are relevant to his medical negligence and corporate negligence claims – is beside the point. A statutory privilege trumps relevance.

Plaintiff's second argument – that records pertaining only to a hospital committee's retrospective, as opposed to prospective, review of a physician's privileges are subject to the statutory privileges – is not borne out by the cases he cites or the language of the privilege statutes. Moreover, the cases he cites predate the enactment of RCW 70.41.200, which requires hospitals to have quality improvement committees that conduct both prospective and retrospective reviews, *see* RCW 70.41.200(1), and makes the information and documents created specifically for, and collected and maintained by, such committees

privileged from discovery without limitation as to whether the review was prospective or retrospective, *see* RCW 70.41.200(3).

Plaintiff's third argument – that he is somehow *ipso facto* entitled, under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), to discovery of the hospital's credentialing files because he has made negligent credentialing/privileging claims against the hospital – is premised upon a misreading of *Burnet*. *Burnet* did not address or have anything to do with the privileges from discovery for records of hospital quality improvement/peer review committees afforded by RCW 70.41.200(3) and RCW 4.24.250.

Plaintiff's fourth argument – that, under subpart (d) of the second sentence of RCW 70.41.200(3), he is entitled to production of otherwise privileged quality improvement committee documents concerning the termination or restriction of Dr. Moynihan's privileges – is premised upon a misreading of subpart (d) of the second sentence of RCW 70.41.200(3). That subpart allows for disclosure of "***the fact that*** staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions."[1] It does not allow for, or require,

[1] The fact that Dr. Moynihan's hospital privileges have been restricted, the specific restrictions imposed, and the reasons for the restrictions have been disclosed, as is reflected in plaintiff's opening appellate brief where he discusses those very facts. *See App. Br. at 2-3.*

disclosure of any *documents*, much less documents privileged from discovery under the first sentence of RCW 70.41.200(3).

Plaintiff's fifth argument – that the hospital's credentialing files are discoverable under an exception in RCW 4.24.250(1) for "actions arising out of the recommendations of [hospital] committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider" – is based on the erroneous assertion that plaintiff's medical malpractice action "arises out of" the termination or restriction of Dr. Moynihan's obstetrical privileges at the hospital. This is not such an action. Nor could it be; Dr. Moynihan's obstetrical privileges were restricted after Jordan Gallinat's delivery, the restrictions are not alleged to have been negligent or a proximate cause of Jordan's alleged injury, and plaintiff has no standing or reason to challenge the restrictions.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The first sentence of RCW 70.41.200(3) provides in pertinent part that:

> Information and documents . . . created specifically for, and collected and maintained by, a [hospital] quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action . . . .

Does that statutory privilege apply to records that were created specifically for, and collected and maintained by, a hospital committee carrying out its

credentialing responsibilities under RCW 70.41.200(1) (a)-(c) and (e)-(f) with respect to a physician as to whom the plaintiff alleges the hospital negligently granted, or allowed the exercise of, certain staff privileges?

2. Does *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), relied upon by plaintiff, address any issue of privilege of hospital quality improvement/peer review committee records?

2. Under subpart (d) of the second sentence of RCW 70.41.200(3), the privilege afforded to hospital quality improvement committee "information and documents" in the first sentence of RCW 70.41.200(3) "does not preclude: . . . in any civil action, disclosure of ***the fact that*** staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions." Does subpart (d) of the second sentence of RCW 70.41.200(3) require a hospital, in response to a malpractice plaintiff's CR 34 request for production, to *produce records documenting* "the fact that [a defendant physician's] staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions," even if such documents were "created specifically for, and collected and maintained by, a quality improvement committee" within the meaning of the first sentence of RCW 70.41.200(3)?

3. The last sentence of RCW 4.24.250(1) provides that:

> The proceedings, reports, and written records of [regularly constituted hospital review] committees or boards [whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or whose duty it is to review and evaluate the quality of patient care], or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020(1) and (2).

Does that statutory privilege also protect from discovery the hospital credentialing/ privileging files at issue in this case?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background for Plaintiff's Malpractice Lawsuit.

On September 17, 1996, Dr. Daniel Moynihan, a family practice physician, unsuccessfully attempted to deliver Jordan Gallinat at Southwest Washington Medical Center (SWMC). CP 88-89, 92, 97, 256. Dr. Jane Ahearn, an OB/GYN, delivered Jordan by emergency C-section. CP 22, 97, 256. Dr. Kathleen Hutchinson, a pediatrician, participated in Jordan's resuscitation. CP 298. In June 2009, Douglas Fellows, as personal representative of Jordan' estate, sued Dr. Moynihan, Dr. Hutchinson, and SWMC (but not Dr. Ahearn), alleging that there was medical negligence by them in connection with Jordan's delivery, and

corporate negligence by SWMC, that caused injury to Jordan. CP 1-6. Each of the defendants denied plaintiff's claims. CP 7-11, 12-15, 16-20.

Dr. Moynihan was licensed to practice medicine in the State of Washington in December 1992. CP 91, ¶ 1.1. As records available publicly from the Medical Quality Assurance Commission show, until September 17, 1997, he had privileges to provide care, including obstetrical care, to patients at SWMC. CP 91, ¶ ¶ 1.2, 1.4. On September 17, 1997, based on Jordan's case and a prior obstetrical case, SWMC's Executive Committee initiated corrective action that resulted in Dr. Moynihan losing his operative vaginal delivery privileges until he completed a mini-residency and was proctored for 30 obstetrical cases. CP 91-92. Rather than comply with those requirements, Dr. Moynihan elected not to renew his obstetrical privileges at SWMC. CP 91, ¶ 1.4. The Department of Health (DOH) subsequently filed charges against Dr. Moynihan. CP 91-94. In response to the DOH charges, Dr. Moynihan entered into a Stipulation to Informal Disposition, CP 96-100, in which he agreed not to perform in-hospital obstetrical or postpartum care, but could continue to assist in C-section operations and provide office prenatal and postnatal care. CP 98, ¶ 2.1. Plaintiff has all of the above information about Dr. Moynihan's hospital privileges and ability to practice, as plaintiff has referenced all of it in his opening brief. *App. Br. at 2-3.*

B. The Discovery Requests at Issue in This Interlocutory Review Proceeding.

In the spring of 2010, plaintiff made the first in a series of motions seeking to compel production of documents from SWMC's privileging, credentialing, and personnel files for Dr. Moynihan, Dr. Hutchinson, and/or Dr. Ahearn. CP 21-46, 286-90, 309-13, 368-69, 492-98. Plaintiff specified, repeatedly, that he wanted records from SWMC's privileging, credentialing, and personnel files. CP 274-75, 286, 289-90, 309, 311, 313, 369, 400, 402, 404-07. Plaintiff's continued reference to "privileging, credentialing, and personnel" files or records, as if there are three separate sets of files or records, however, is inapt. There are no "personnel" files or records for any of the three physicians as they are not and were not employees of SWMC, but merely were granted medical staff membership and hospital staff privileges at SWMC. CP 71, 217. Moreover, SWMC does not maintain separate privileging and credentialing files; the privileging file for a physician is contained in the credentialing file for that physician. CP 386, ¶ 2.

SWMC objected to producing the requested credentialing files citing the privilege conferred on hospital quality improvement committee information and documents since 1986 by RCW 70.41.200(3) and the "peer review" privilege conferred on the "proceedings, reports, and

written records" of regularly constituted hospital review committees by an older statute, RCW 4.24.250. CP 191-92, 195-198, 258-60, 294-95, 331-32, 344-45, 386-87. In a series of rulings, the trial court sustained the defendants' privilege-based objections, CP 28-85, 334-35, 413-14; declined plaintiff's request that the court review SWMC's files *in camera* to evaluate the claims of privilege, CP 417-18; and denied plaintiff's motion for a "CR 37 evidentiary hearing," CP 584.

IV. STANDARD OF REVIEW

Appellate courts ordinarily review discovery rulings for abuse of discretion. *E.g., T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). The principal arguments plaintiff makes in his opening brief, however, concern the interpretation of statutes and judicial decisions, issues of law subject to *de novo* review. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 426, 237 P.3d 274 (2010) (the interpretation of a statute is an issue of law subject to *de novo* review); *State v. Drum*, 168 Wn.2d 23, 31, 225 P.3d 237 (2010) (issues of law are reviewed *de novo*); *In re Estate of Kissinger*, 166 Wn.2d 120, 125, 206 P.3d 665 (2009) (courts interpret statutes, and questions of law *de novo*).

V. ARGUMENT

A. The Statutory Context for the Discovery Rulings at Issue.

The Legislature enacted RCW 70.41.200 in 1986. Subsection (1) of that statute requires hospitals to have health care quality improvement programs that include, among other things, periodic review of the competence and credentials of all physicians associated with the hospital and a medical staff privileges sanction procedure, and both retrospective and prospective review of the services rendered in the hospital to improve the quality of medical care and to prevent medical malpractice.[2]

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[2] RCW 70.41.200(1) provides in pertinent part (emphases supplied):

> (1) ***Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following***:
>
> (a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, ***both retrospectively and prospectively***, in order to improve the quality of medical care of patients and to prevent medical malpractice. . .;
>
> (b) ***A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges***;
>
> (c) ***The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are . . . associated with the hospital***;
>
> * * *
>
> (e) ***The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients*** including health care-associated infections as defined in RCW 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;
>
> (f) ***The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual***

Subsection (3) creates an evidentiary privilege for information and documents created for and maintained by hospital quality improvement committees:

> ***Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action***, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the

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physicians within the physician's personnel or credential file maintained by the hospital; . . . .

> department of health to be made regarding the care and treatment received. [Emphasis supplied.][3]

RCW 4.24.250, enacted in 1971, allowed, but did not require, any hospital to have a "regularly constituted review committee or board of a . . . hospital whose duty it is to evaluate the competency and qualifications of members of the profession . . . ," and barred disclosure or civil discovery of the records of such a hospital committee:

> (1) . . . The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider. . .[4]

B. Plaintiff Is Claiming a Right to Production of SWMC Physician-Credentialing Documents Based Exclusively on a Claim of Relevance and/or What He Contends Are Judicially Recognized or Statutory Exceptions to "Quality Improvement" and/or "Peer Review" Privileges.

The numbers of issues in this interlocutory discovery dispute that spans multiple discovery motions in the trial court and discretionary review motions in the appellate courts have now been narrowed in the

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[3] RCW 70.41.230(5) reiterates that "[i]nformation and documents . . . created specifically for, and collected and maintained by a quality improvement committee are not subject to discovery or introduction into evidence in any civil action," subject to the same limited exceptions set forth in RCW 70.41.200(3).

[4] The statute's reference to "actions arising out of the . . . restriction or revocation of" clinical staff privileges is to actions by a provider whose privileges have been restricted or revoked, not to malpractice actions against such a provider.

Brief of Appellant Fellows. Although that opening appellate brief does not comply with the RAP 10.3(a)(4) requirement for formal assignments of error, plaintiff argues in it that the trial court should have ordered SWMC to produce its credentialing/privileging records for Drs. Moynihan, Hutchinson, and Ahearn under five somewhat overlapping legal theories. Under none of those theories does plaintiff dispute that the records at issue were created for, and have been collected and maintained by, an SWMC quality improvement committee or committees performing "quality improvement" functions within the meaning of RCW 70.41.200(1)(a)-(c) and (e)-(f) and 70.41.200(3)(first sentence), or by a "regularly constituted" hospital peer review committee "whose duty it is to evaluate the competency and qualifications" of physicians within the meaning of last sentence of RCW 4.24.250(1).[5] Plaintiff claims only that he is entitled to the records at issue on the ground that they are relevant to his "negligent credentialing" and/or "negligent privileging" claims against SWMC, *App. Br. at 8-10,* and/or because of what he claims are some applicable judicially recognized or statutory exceptions to the statutory privileges afforded by RCW 70.41.200(3) and RCW 4.24.250(1), *App. Br. at 10-19.*

[5] SWMC submitted, among other things, the Declaration of Cindy Eling establishing that the records at issue were those of such committees. CP 549-59.

C. Privileges Are Not Trumped by Relevance; Privileges Trump Relevance.

Plaintiff argues, *App. Br. at 8-10*, that, because he is asserting a corporate negligence claim against SWMC the hospital's credentialing records for Drs. Moynihan, Hutchinson, and Ahearn are relevant to his claims. That may be true, but it is beside the point. Precluding the discovery or admission of relevant evidence is what privileges do. Defendants have not claimed that the requested records have no potential relevance. They have invoked the RCW 70.41.200(3) and RCW 4.24.250(1) statutory privileges that preclude discovery and admissibility of such hospital quality improvement or peer review committee records. If either privilege applies, potential or actual relevance of the documents does not matter. Indeed, under CR 26(b)(1), parties are not entitled to discovery of matters, no matter how relevant, that are privileged.[6]

Plaintiff makes related but fallacious assertions, *App. Br. at 9-10*, to the effect that he cannot muster any evidence to support "negligent credentialing" and/or "negligent privileging" claims without SWMC's credentialing and privileging records for Dr. Moynihan.[7] That is not true.

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[6] CR 26(b)(1) provides in pertinent part: "Parties may obtain discovery regarding any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action . . . ." [Emphasis added.]

[7] Plaintiff asserts, *App. Br. at 9*, that he does not know whether Dr. Moynihan had privileges to use a vacuum extractor for Jordan Gallinat's delivery in September 1996 and needs SWMC's privileging records to find that out. He asserts, *App. Br. at 10*, that

Plaintiff can inquire of Dr. Moynihan concerning his training, education, experience and scope of privileges at SWMC, and in fact has already done so to a certain extent, *see* CP 62-65, 566-74. And, he can inquire of Dr. Moynihan's colleagues with personal knowledge, or of Dr. Moynihan's medical school, or persons with whom Dr. Moynihan trained or worked and who have opinions concerning his competence based on personal knowledge (as opposed to based on participation in "quality improvement/peer review" committee proceedings). Moreover, he can, and as this Court recognized in *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984), must, "utilize his . . . own experts to evaluate the facts underlying the incident which is the subject of the suit and also use them to determine whether the hospital's care comported with proper quality standards."

D. Neither *Coburn v. Seda* Nor *Anderson v. Breda* Held, and Neither RCW 4.24.250(1) Nor RCW 70.41.200(3) States, that the Statutory Privileges Afforded to Hospital Quality Improvement/Peer Review Committee Records Apply Only When the Committee Conducts a "Retrospective" Review, As Opposed to a "Prospective" Review.

Relying on a statement in *Coburn v. Seda*, 101 Wn.2d 270, 277-78, 677 P.2d 173 (1984) that was repeated in *Anderson v. Breda*, 103 Wn.2d

he needs Dr. Moynihan's privileging records in order for his standard of care expert to be able to testify whether Dr. Moynihan exceeded his professional training, competence, or hospital privileges in using a vacuum extractor and whether SWMC was corporately negligent in allowing Dr. Moynihan to do so unsupervised. Ultimately, whether Dr. Moynihan "exceeded," or was allowed by SWMC to exceed his training, competence or privileges is wholly irrelevant if he did not negligently cause injury to Jordan Gallinat.

901, 700 P.2d 737 (1985), plaintiff argues, *App. Br. at 10-11*, that, while he may not be entitled to records of SWMC's *retrospective* inquiries and credentialing decisions, he *is* entitled to records of SWMC's *prospective* inquiries and credentialing decisions, *i.e.*, those reflecting its initial decisions to grant privileges, in particular to its initial decision, before September 1996, to grant Dr. Moynihan obstetrical (or more specifically, vacuum extraction) privileges.[8] Neither *Coburn* nor *Anderson* so holds.[9]

In *Coburn*, 101 Wn.2d at 277-78, the Court stated that RCW 4.24.250 affects the scope of discovery only if the hospital committee in question is a regularly constituted committee or board of the hospital charged with reviewing and evaluating the quality of patient care, and that among the many relevant factors a trial court should consider in making that determination is "whether the committee's function is one of current patient care or retrospective review." The Court did not hold that the privilege afforded by RCW 4.24.250 could apply only to retrospective reviews of physicians' privileges. In *Anderson*, which also involved interpretation and application of RCW 4.24.250, the court wrote that "[i]n

[8] Plaintiff first made this "retrospective" versus "prospective" review argument in his motion to modify the Court of Appeals' Commissioner's ruling denying review under RAP 2.3(b). *See Mot. to Modify at 9-10.*

[9] Nor does anything in the language of either RCW 4.24.250 or RCW 70.41.200 suggest that the privileges they afford to the records of hospital quality improvement/peer review committees apply only when such committees conduct "retrospective", as opposed to "prospective" reviews.

determining whether a hospital activity is properly classified as [that of] a regularly constituted quality review committee, the organization and function of the committee may be examined . . . [and w]hether the activity is concerned with retrospective review or current care is an additional consideration." *Anderson*, 103 Wn.2d at 905-06 (citing *Coburn*). Neither *Coburn* nor *Anderson* involved the interpretation or application of the privilege afforded by RCW 70.41.200(3), which was enacted after those cases were decided.

Even if one interprets *Coburn* and *Anderson* as having held that the privilege against discovery conferred on a hospital's "peer review" committee records by *RCW 4.24.250* does not apply to records of a hospital's *prospective* decision to grant a physician hospital privileges, those cases arose before RCW 70.41.200 took effect. RCW 70.41.200(1)(a) expressly requires every hospital to establish "a quality improvement committee with the responsibility to review the services rendered in the hospital, ***both retrospectively and prospectively***, in order to improve the quality of medical care of patients and to prevent medical malpractice [emphasis supplied]," and RCW 70.41.200(3) confers a privilege against discovery on the records of such committees. Thus, any distinction between "retrospective" and "prospective" reviews conducted by hospital quality improvement/peer review committees that may have

been drawn when the courts in *Coburn* and *Anderson* interpreted RCW 4.24.250 was eliminated for records of hospital quality improvement committees by the subsequent enactment of RCW 70.41.200. Thus, plaintiff's reliance on *Coburn* and *Anderson* is misplaced.

Plaintiff also mistakenly asserts, *App. Br. at 11*, that, under *Coburn* and *Anderson*, a hospital's credentialing files are "administrative records" or "files of the hospital administration," and thus are not privileged. Neither case so holds.[10] And plaintiff's blanket assertion that credentialing files are merely "administrative records" does not make it so. Moreover, RCW 70.41.200, enacted after *Coburn* and *Anderson* were decided, makes clear that physician credentialing and privileging, and the maintenance of physician credential files, are part and parcel of a hospital's quality improvement program requirements, RCW 70.41.200(1)(a)-(c) and (e)-(f), and that "[i]nformation and documents . . . created specifically for, and collected and maintained by a quality improvement committee are not subject to review or disclosure . . . or

[10] *Coburn* makes no reference to "administrative records" or "files of the hospital administration." Although *Anderson* makes reference to a California Court of Appeals decision that held that "the discovery immunity does not embrace the files of hospital administration," it also makes clear that "[t]hese administrative records are discoverable ***to the extent they do not contain the record of immune proceedings.***" *Anderson*, 103 Wn.2d at 906-07 (emphasis added) (citing *Shulz v. Superior Court*, 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (1977)). Neither case says that credentialing files are merely hospital administrative records, and not records of hospital quality improvement/peer review committees immune from discovery.

discovery or introduction into evidence in any civil action . . . ," RCW 70.41.200(3).

E. The Assertion Against a Hospital of "Negligent Privileging" or "Negligent Credentialing" Claims Does Not Override or Nullify the Privileges Conferred by RCW 70.41.200(3) and RCW 4.24.250(1).

Relying on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), plaintiff argues, *App. Br. at 12-16*, that he is entitled to any and all of SWMC's credentialing and privileging records concerning Drs. Moynihan, Hutchinson, and Ahearn because he has asserted negligent privileging/credentialing claims against SWMC. In effect, he maintains that a plaintiff can nullify any statutory privilege otherwise applicable to such hospital records by pleading his way around the privilege, despite the fact that the legislature has made the privilege applicable "in any civil action." Plaintiff contends that *Burnet* holds that a hospital's credentialing and privileging files as to an allegedly negligent physician are *ipso facto* discoverable when a medical malpractice plaintiff asserts a "negligent credentialing" or "negligent privileging" claim against a hospital.

Plaintiff misreads *Burnet*. The issues in *Burnet* were whether a plaintiff's violation of pre-trial scheduling orders had been willful and prejudicial to the defendants. The trial court in *Burnet* did not make any ruling as to privilege, and the Supreme Court did not even address in

dictum the question of whether a hospital's credentialing and privileging records are subject to the privileges afforded by RCW 70.41.200(3) or RCW 4.24.250(1) when a plaintiff asserts a "negligent credentialing or privileging" claim. The *Burnet* court did not cite RCW 70.41.200 or RCW 4.24.250 even in passing. All the court held was that an order precluding assertion of, and (unspecified) discovery concerning, negligent credentialing and privileging claims against the defendant hospital had been too severe a sanction for the plaintiff's procedural omissions because there had not been willful misconduct and the case was not far enough along for the defense to have suffered substantial prejudice.

F. Subpart (d) in the Second Sentence of RCW 70.41.200(3) Applies to Certain *Facts*; It Does Not Make *Records* of Hospital Privileging Decisions Discoverable by Plaintiffs in Civil Lawsuits.

Relying on subpart (d) in the second sentence of RCW 70.41.200(3), plaintiff argues, *App. Br. at 16-17*, that SWMC may not assert the "quality improvement" privilege as to, and must produce, the hospital's records relating to the termination or restriction of Dr. Moynihan's privileges, the specific restrictions imposed, and the reasons for the restrictions. Plaintiff misreads subpart (d); it has nothing to do with the production of otherwise privileged hospital quality improvement committee *records*.

Subpart (d) in the second sentence of RCW 70.41.200(3) provides that the privilege that the first sentence of RCW 70.41.200(3) confers on hospitals' quality improvement committee "information and documents" does not preclude "disclosure of ***the fact that*** [a defendant physician's] staff privileges were terminated or restricted, including the specific restrictions imposed, if any[,] and the reasons for the restrictions." Plaintiff implicitly asks this Court to hold that disclosure of "*the fact that*" is synonymous with disclosure of "*documents reflecting*." Plaintiff offers no text-based or other argument as to why a right to disclosure of a "fact" means a hospital must *produce* otherwise privileged *documents* relating to that fact.

Any such text-based argument would fail in any event in light of how precisely the legislature worded all five of the subparts in the second sentence of RCW 70.41.200(3). Subpart (a) provides that the privilege conferred in the first sentence of RCW 70.41.200(3) does not preclude "discovery of the identity of [certain] persons." Subpart (b) provides that the first sentence does not preclude "the testimony of any person concerning [certain kinds of] facts." Subpart (c) provides that the first sentence does not preclude "introduction into evidence [of] information collected and maintained by quality improvement committees" "in any civil action by a health care provider regarding the restriction or

revocation of that individual's clinical or staff privileges." Subpart (e) provides that the first sentence does not preclude "discovery and introduction into evidence of the patient's medical records."

Thus, the legislature took care in drafting subparts (a), (b), (c) and (e) to specify exactly what discovery, introduction into evidence, or testimony was not precluded by the privilege conferred in the first sentence of RCW 70.41.200(3). The legislature took just as much care in drafting subpart (d). By saying that the privilege that the first sentence of RCW 70.41.200(3) confers on "information and documents" does not preclude "disclosure of [certain] *fact[s]*," the legislature kept the privilege intact as to any and all related *documents*.

G. Plaintiff's Reliance on the Exception to the Privilege in RCW 4.24.250 for Actions Arising Out of Hospital Committee Recommendations to Restrict or Revoke a Health Care Provider's Hospital Privileges, and on *Toll Bridge Authority*, A Property Insurance Coverage Decision, Is Misplaced.

Plaintiff argues, *App. Br. at 16-17*, (a) that this case "originates or flows from" SWMC's termination or restriction of Dr. Moynihan's privileges and thus "arises out of" those privileging decisions; (b) that a property insurance coverage decision, *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989), held that "arising out of" clauses are to be broadly construed; and (c) that means that SWMC's privileging records for Dr. Moynihan are discoverable under the exception

to the privilege set forth in RCW 4.24.250 for "actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider . . ."[11] The logic of that argument is not self-evident and does not withstand even cursory scrutiny.

First, plaintiff's claim *does not* "arise out of" action SWMC took to restrict or terminate Dr. Moynihan's hospital privileges. Plaintiff is not suing either Dr. Moynihan or SWMC for the action SWMC took after Jordan Gallinat's birth; he is suing Dr. Moynihan for what he did or did not do *during* Jordan Gallinat's birth, and is suing SWMC for granting Dr. Moynihan, *before* Jordan's birth, privileges to provide obstetrical care using a vacuum extractor.[12] The restriction of Dr. Moynihan's obstetrical privileges occurred well after Jordan's delivery and the restriction is not alleged to have been negligent or a proximate cause of Jordan's alleged injury. And, lest there be any doubt that RCW 4.24.250(1)'s reference to "actions arising out of the . . . restriction or revocation of clinical or staff privileges is a reference to actions by a provider whose privileges have

[11] Plaintiff first made the argument that this was an action fitting within the exception set forth in RCW 4.24.250(1) in footnote 2 on page 5 of the reply he filed in the Court of Appeals in support of his motion for discretionary review.

[12] What actions SWMC took *after* Jordan Gallinat's birth, if not privileged, would arguably be discoverable in light of CR 26's "reasonably calculated to lead to discovery of admissible evidence" standard for discoverability, but evidence of those actions would be inadmissible at trial because of ER 407, which makes evidence of post-event remedial measures inadmissible to prove negligence in connection with the event.

been restricted or revoked, not to malpractice actions against such a provider, one need only look at the companion exception contained in RCW 70.41.200(3), second sentence, subpart (c) for " in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider."

Second, *Toll Bridge Authority* had nothing to do with hospitals, quality improvement activity, privileges, or even discovery. It has no bearing on this appeal.

H. Plaintiff's Arguments Amount to Cynical Attempts to Undermine the Critical Self-Examination Policies Behind RCW 70.41.200 and RCW 4.24.250.

RCW 70.41.200(1)'s quality improvement program requirements are designed to facilitate and encourage critical self-examination by hospitals in order both to improve quality of care and to prevent malpractice. The legislature decided to promote those twin goals partly by imposing requirements for quality improvement programs and partly by protecting the self-examination process from disclosure in civil litigation. Critical self-assessment by hospitals is hardly encouraged or incentivized if records of that process, created specifically for, and collected and maintained by, their quality improvement committees, are transformed

into a repository of material that plaintiffs' lawyers can tap and use against hospitals in civil liability litigation. As the court observed in *Coburn*, 101 Wn.2d at 274:

> The discovery protection granted [by RCW 4.24.250 to] hospital quality review committee records, like work product immunity, prevents the opposing party from taking advantage of a hospital's careful self-assessment. The opposing party must utilize his or her own experts to evaluate the facts underlying the incident which is the subject of suit and also use them to determine whether the hospital's care comported with proper quality standards.

With the enactment in 1986 of RCW 70.41.200, which both mandated peer-review functions (previously optional under RCW 4.24.250) and expanded the scope of "quality improvement" activities in which hospitals must engage, to expressly include credentialing and other kinds of "retrospective" *and* "prospective" quality review activities, the legislature made even clearer its intention to "prevent [malpractice plaintiffs] from taking advantage of a hospital's careful self-assessment" – which is exactly what plaintiff is trying to do with his discovery demands upon SWMC. It is not as if the plaintiffs' bar generally, or plaintiff's counsel specifically, lacks the skills, resources, and methods to develop evidence and secure expert testimony to support negligence claims against physicians and hospitals.

Nothing in RCW 70.41.200(3) or RCW 4.24.250(1) prevents plaintiff's counsel from examining medical records, deposing Dr. Moynihan, Dr. Hutchinson, Dr. Ahearn and/or eyewitnesses to Jordan Gallinat's delivery and/or postpartum care, determining from non-privileged sources the extent of those physicians' training and experience in their respective fields (including Dr. Moynihan's training and experience with vacuum extractors prior to September 1996), or having plaintiff's own experts evaluate information so obtained and determine for themselves whether the hospital complied with the applicable standard of care. Plaintiff just is not entitled to demand and take advantage of SWMC's quality improvement/peer review committee records.

I. Plaintiff's Reliance on *Magaña* and *Fisons* Is Also Misplaced.

Plaintiff argues, *App. Br. at 17-18*, that SWMC failed to look for privileging decisions in enough of its files, and improperly limited its search to its credentialing files.[13] He claims that violated duties

[13] Plaintiff represents, *App. Br. at 6*, that SWMC's counsel told the trial court at the August 17, 2010 hearing that "it just didn't click" that Gallinat was seeking "files regarding terminating, restricting Dr. Moynihan's privileges," While it is true that she made that statement, she did not make it in the context of plaintiff's request for production of Drs. Moynihan's, Hutchinson's, and Ahearn's credentialing files, but made it in response to a concern that she had not supplemented unrelated interrogatory responses, which she had been instructed to do in one of the trial court's June 21 orders that required supplementation of Interrogatory Nos. 23 and 24. Plaintiff has neglected to acknowledge that. At the August 17 hearing, the trial court specifically held that "on the credentialing and privileging information, I'm satisfied that my [May 4] ruling was followed." 8/17 RP 68; CP 582-84. The court later made clear that both its May 4 order and its June 21 order denying *in camera* review had only to do with production of the credentialing/privileging files, 8/17 RP 76, which the trial court were privileged, and that

recognized by *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 585-86, 220 P.3d 191 (2010) and *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 347, 858 P.2d 1054 (1993). That argument is disingenuous, legally incorrect, and not germane to the issue of privilege.

The reason the credentialing files were what SWMC searched is simple enough: those were the files plaintiff *asked* SWMC to produce records from, repeatedly using the modifying words "credentialing," "privileging," and "personnel," [14] and not simply "files" or "all files." CP 274-75, 286, 289-90, 309, 311, 313, 369, 402, 404-07.[15] By contrast, the plaintiff in *Magaña*, according to that decision, "continued to request *all* seat back failure claims in Hyundai products from 1980 to the present" [italics by the court]," *Magaña*, 167 Wn.2d at 579, and the plaintiffs in *Fisons* had been ordered, according to that decision, to produce "all

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both orders had been complied with, 8/17 RP 77. The trial court further found that his June 21 order concerning supplementation of Interrogatory Nos. 23 and 24 inadvertently had not been complied with and gave SWMC's counsel an additional week to obtain SWMC's supplementation of those interrogatories. 8/17 RP 77-78.

[14] Although plaintiff has repeatedly used the modifying words "credentialing," "privileging," and "personnel" for the files he was asking SWMC to produce records from, as explained at pages 7-8, *supra*, there are no personnel files or separate privileging files for Drs. Moynihan, Hutchinson, or Ahearn. *See* CP 71, 217. And, contrary to plaintiff's claim that the hospital needed to search its "investigation file," *App. Br. at 17*, there is no evidence of a separate "investigation file." 8/17 RP 63-65.

[15] Plaintiff also neglects to acknowledge that Mize Conner, M.D., the expert whose declaration he submitted in support of one of his discovery motions, specified that he wished to review credentialing, privileging, or personnel files. CP 400.

documents requested which related to theophylline [*i.e.*, the drug product at issue]." *Fisons*, 122 Wn.2d at 308.

But, even if plaintiff had always been requesting production of documents relating to credentialing or privileges from any and all SWMC files, that would have no effect on the issues this case presents, or on the merits of plaintiff's legal arguments, or on statutory interpretation and the analysis this Court should apply. The issue would still be whether records that are subject to the RCW 70.41.200(3) (first sentence) quality improvement privilege, CP 275, are nonetheless discoverable under *Coburn/Anderson*, or *Burnet*, or the exceptions contained in subpart (d) of the second sentence of RCW 70.41.200(3) or in RCW 4.24.250. For the reasons explained above, the answer is no; all such records are privileged and not discoverable. The trial court discovery orders that plaintiff asks this Court to reverse were correct.

VI. CONCLUSION

For the foregoing reasons, because all such records are covered by the RCW 70.41.200 quality improvement privilege, and/or the RCW 4.24.250 peer review privilege, the trial court did not err in denying plaintiffs' motions to compel SWMC to produce its credentialing/ privileging files for Drs. Moynihan, Hutchinson, and Ahearn, or records

that might be contained therein concerning the termination or restriction of Dr. Moynihan's privileges at SWMC. The Supreme Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of Washington that, on the 5th day of December, 2011, I caused a true and correct copy of the foregoing Joint Brief of Respondents to be delivered in the manner indicated below to the following counsel of record:

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